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Petition

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81-641
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CHARLES W. DEPENDAHL, WILLIAM J. HEALY and
JOHN C. CALHOUN,
Petitioners,

vs.

PAUL KALMANOVITZ,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

1. Whether 29 U.S.C. § 1144 was Intended to Preempt the State Law Cause of Action for Tortious Interference with Contract, when the Contractual Rights Interfered with Have Some Protections Under ERISA.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners Charles W. Dependahl, William J. Healy and John C. Calhoun respectfully pray that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on June 30, 1981.

OPINION BELOW

The Opinion of the Court of Appeals is reported at 653 F.2d 1208. The Opinions of the District Court relevant to the issues presented by this Petition for Certiorari appear at 491 F.Supp. 1188, and 478 F.Supp. 359.

JURISDICTION

The Judgment of the Court of Appeals for the Eighth Circuit was entered on June 30, 1981. A timely Petition for Rehearing or for Rehearing En Banc was denied on July 27, 1981, and this Petition for Certiorari was filed within 90 days of that date. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 1132(a);

29 U.S.C. § 1140;

29 U.S.C. § 1144.

STATEMENT OF THE CASE

Petitioners herein, plaintiffs below, brought these consolidated actions pursuant to 29 U.S.C. § 1132(a) to enforce their rights under ERISA. Petitioners were formerly executives with the Falstaff Brewing Corporation (Falstaff). Following acquisition of that company by Paul Kalmanovitz (Kalmanovitz) in 1975, Petitioners' services were terminated.

On Kalmanovitz' instructions, Falstaff declined to pay plaintiffs benefits then due and owing under the Falstaff Severance Pay Plan, or to maintain a split-dollar life insurance plan known as the Contractual Benefit for Survivors Plan (CBS Plan). The District Court found that plaintiffs' rights under each plan were protected by ERISA, and entered judgment in favor of plaintiffs enforcing their rights to both plans.

Petitioners also asserted a pendent claim against Kalmanovitz for tortious interference with their rights under the Severance Pay Plan and the CBS Plan. In a court tried case, the District Court entered judgment in favor of plaintiffs on this claim, and awarded punitive damages against Kalmanovitz in the amount of $150,000. The District Court held that, under Missouri law, Kalmanovitz was liable for punitive damages because of his malicious and bad faith actions. 491 F.Supp. at 1198.

The United States Court of Appeals for the Eighth Circuit affirmed the District Court's judgment with respect to the Severance Pay and CBS Plans, for reasons not relevant to this Petition for Certiorari. The Court of Appeals reversed the award of punitive damages. While the Court of Appeals did not challenge the factual basis for punitive damages, it held that the District Court had no authority to award them. The Court of Appeals held that 29 U.S.C. § 1144 was intended by Congress to entirely preempt the state common law action for tortious interference with any contractual right subject to ERISA protections. 653 F.2d at 1215-16. The Court of Appeals also held that ERISA did not allow punitive damages to redress malicious and bad faith conduct. 653 F.2d at 1216.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Court Of Appeals Raises Significant And Recurring Questions Concerning The Scope Of The Preemption Of State Law By ERISA, 29 U.S.C. § 1144.

Only last term, in *Alessi* v. *Raybestos-Manhattan, Inc.*, ____ U.S. ____, 68 L.Ed. 2d 402 (1981), this Court held that the ERISA preemption clause "gives rise to some confusion where, as here, it is asserted to apply to a state law ostensibly regulating a matter quite different from pension plans." ____ U.S. at ____, 68 L.Ed. 2d at 417. This Court held that the issues raised in *Alessi* did not require the Court to "determine the outer bounds of ERISA's preemptive language," and expressed no views on the merits of the varying conclusions reached by courts in other contexts. ____ U.S. at ____, 68 L.Ed. 2d at 417-18 & n. 21.

The Court of Appeals' holding in the instant case—that ERISA preempts the state cause of action for tortious interference with contract—presents an appropriate vehicle for the Court to resolve this recurring issue and determine the outer limits of the ERISA preemption.

II. The Decision Of The Court Of Appeals Conflicts With The Decisions Of Other Courts Of Appeals As To The Proper Interpretation Of 29 U.S.C. § 1144.

The ambiguous language of 29 U.S.C. §1144 has produced inconsistent constructions by the Court of Appeals. The Second Circuit for example, has held that a state law does not "relate to" an ERISA plan if the law "only in the most remote and peripheral manner touch[es] upon pension plans." *American Telephone and Telegraph Co.* v. *Merry*, 592 F.2d 118, 121 (2d Cir. 1979). As a result, the Second Circuit found an implied exemption from § 1144 for state ordered family support payments.

In *Operating Engineers Local No. 628 Pension Trust Fund* v. *Zamborsky*, 650 F.2d 196 (9th Cir. 1981), the Court of Appeals for the Ninth Circuit found an implied exemption for a court order garnishing ERISA benefits to provide support to a divorced wife. Despite a "certain logical appeal," the preemption claim was rejected as inconsistent with Congressional intent. 650 F.2d at 199-200.

These holdings, emphasizing the purpose of ERISA and its legislative history, are irreconcilable with the instant opinion of the Eighth Circuit. That court found irrelevant the proposition that state law was entirely consistent with the purpose of ERISA. Instead, it relied on a purely literal reading of Section 1144 to oust *all* state laws touching on pension plans. 653 F.2d at 1215. This literalist approach is in conflict with the reasoning and the holdings of the Second and Ninth Circuit, and underscores the necessity of review by this Court.

The Eighth Circuit found support for its literalist approach in 29 U.S.C. Section 1140, which the court believed was a complete federalization of the common law tort of interference with ERISA—protected contracts. This rationale is squarely inconsistent with the holding of the Sixth Circuit in *West* v. *Butler*, 621 F.2d 240 (6th Cir. 1980).

In *West*, the plaintiffs alleged that defendants had engaged in violent secondary picketing for the purpose of interfering with the welfare and pension rights of beneficiaries working in the picketed mines. That is a classic case of intentional interference with ERISA protected contractual rights. Following an exhaustive review of the legislative history, a review absent from the Court of Appeals' decision in the instant case, the Sixth Circuit concluded that such complete federalization of the common law action for tortious interference was "far from what Congress had in mind . . . ." 621 F.2d at 246.

These conflicts between the circuits concerning the appropriate interpretation of ERISA's preemption clause

highlight the confusion it has generated, and underscore the need for review by this Court.

III. The Decision Of The Court Of Appeals Raises Significant And Recurring Questions Concerning The Relationship Between The States And The Federal Government.

Any holding that Congress has preempted the application of state law raises special concerns in our federal system of government, because such a ruling strikes at the state's sovereignty. Absent the most compelling indications of congressional intent to preempt, such a result is inappropriate.

This Court has expressly recognized that an action for tortious interference with contract is a matter of fundamental state concern. *International Union, United Automobile, Aircraft & Agricultural Implement Workers of America* v. *Russell*, 356 U.S. 634 (1958); *Farmer* v. *United Brotherhood of Carpenters & Joiners of America, Local 25*, 430 U.S. 290, 296-297 (1977). *Accord, Silkwood* v. *Kerr-McGee Corp.*, 637 F.2d 743, 746 (10th Cir. 1980).

By contrast, there is absolutely no national interest in the preemption of the state common law action for tortious interference with ERISA contracts. An action for tortious interference imposes no regulations whatever upon the employee benefit plan itself. Its sole target is a third-party intermeddler who vents his malice at the expense of the participants or beneficiaries of employee benefit plans. As the Court of Appeals recognized, preemption of the state tortious interference claim serves no purpose whatever with respect to national uniformity of regulation of pension plans. 653 F.2d at 1215.

The instant case thus presents the weakest of all possible cases for federal preemption of state law. The state has a deeply rooted and fundamental interest in preserving its laws intact, whereas preemption is entirely unnecessary to advance any national interest in uniform regulation. The ambiguous and con-

fusing language of the ERISA preemption clause does not warrant such a useless intrusion upon state sovereignty.

If the Court of Appeals' ruling in the instant case accurately states the law, it has laid the ground work for a far-reaching ouster of state law in areas of vital concern to the states. If ERISA preempts state law merely because a tort is committed in the course of a dispute over benefits due under an ERISA plan, then other torts such as assault, slander, or intentional infliction of mental distress are also preempted. The Court of Appeals' Opinion in the instant case strongly implies that Kalmanovitz would be immunized from an action for slander, had he announced that Petitioners would not receive their ERISA benefits because they were homosexuals or communists. The Opinion implies that Kalmanovitz would be immunized from an action for intentional infliction of emotional distress had he informed one of Petitioners' grieving widows at the graveside that no benefits would be forthcoming because her late husband was a cheat and a fraud.

The depth of these intrusions upon state sovereignty should be apparent. They arise directly from the Court of Appeals' literal construction of ERISA as preempting all state causes of action relating in any way to employee benefit plans, no matter how tangential to the purposes of ERISA.

These extensive intrusions upon state sovereignty underscore the importance of prompt resolution by this Court of the outer boundaries of the ERISA preemption clause.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the Judgment and Opinion of the Eighth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

(653 F.2d 1208)

[1208] Charles W. Dependahl, Jr. and
William J. Healy, Appellees,
Cross-Appellants,

v.

Falstaff Brewing Corporation,
a Delaware corporation, and Paul Kalmanovitz,
Appellants, Cross-Appellees.

John C. Calhoun, Appellee,
Cross-Appellant,

v.

Falstaff Brewing Corporation,
a Delaware corporaton, and Paul Kalmanovitz,
Appellants, Cross-Appellees.

Nos. 79-2050, 80-1714, 80-1861
and 80-1900.

United States Court of Appeals,
Eighth Circuit.

Submitted March 11, 1981.

Decided June 30, 1981.

Rehearing and Rehearing En Banc
Denied July 27, 1981.

* * * * * * *

Theordore F. Schwartz (argued), Barry S. Ginsburg, Clayton, Mo., for appellants/cross-appellees.

Carroll J. Donohue, Harry B. Wilson, Mark G. Arnold (argued), Husch, Eppenberger, Donohue, Elson & Cornfeld, St. Louis, Mo., for appellees, cross-appellants.

Before BRIGHT, Circuit Judge, GIBSON, Senior Circuit Judge, and ROSS, Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge.

This appeal concerns federal issues arising under the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* (1976) (ERISA), together with pendent state claims for tortious interference and fraud. Falstaff Brewing Corporation and Paul Kalmanovitz, controlling shareholder of Falstaff, appeal the district court's[1] findings that Kalmanovitz interfered with the contractual relationship between Falstaff and three former executive officers, Charles W. Dependahl, Jr., William J. Healy, and John C. Calhoun, resulting in tortious Missouri common-law and ERISA statutory violations. Falstaff and Kalmanovitz also appeal the district court's award of punitive damages, attorney fees, and prejudgment interest. Finally, Falstaff and Kalmanovitz appeal the district court's discovery sanction of dismissing their counterclaims and affirmative defenses. The former executive officers cross-appeal the district court's failure to find fraud and tortious interference by Kalmanovitz with respect to their employment contracts. With respect to the direct appeal, we affirm the district court on its findings of ERISA violations, the award of attorney fees, and the imposition of discovery sanctions. We reverse the court on its award of punitive damages and its computation of prejudgment interest. With respect to the cross-appeal, we affirm the district court.

I.

A.

In late 1974, Falstaff was experiencing severe financial difficulties. Kalmanovitz, a brewer and entrepreneur, was contacted by Falstaff, which was in need of new capital. After a

---

[1] The Honorable John F. Nangle, United States District Judge, Eastern District of Missouri.

series of meetings, Kalmanovitz and Falstaff signed an agreement on March 10, 1975, whereby Kalmanovitz would purchase ten million dollars of newly issued preferred stock and would personally guarantee ten million dollars of Falstaff's debts, in return for voting control of the corporation.

[1211] In order for the deal to go through, the articles of incorporation had to be amended by the shareholders. On April 28, 1975, the stockholders met and approved the deal.

On May 1, 1975, Kalmanovitz terminated Dependahl, former vice-president and director of marketing, and Healy, former vice-president, secretary, and treasurer of Falstaff. Later, on August 8, 1975, Calhoun, secretary and treasurer since May 1, was terminated by Kalmanovitz.

Prior to the terminations, these former officers appear to have been under the impression that because the takeover by Kalmanovitz was not opposed, top management would be retained. Following the terminations, Kalmanovitz directed that severance payments to Healy and Dependahl be stopped. Falstaff subsequently made an offer to each that the severance payments would be resumed if Healy and Dependahl would waive their rights to the CBS plan, a whole-life insurance program for executives. The former executives refused and severance payments were never resumed.

Calhoun, at the time of his termination, had not been employed by Falstaff for the required period of fifteen years necessary to receive severance payments. Calhoun, therefore, did not receive any payments after his termination. The severance plan, however, had only recently been amended in June 1975 to provide for a fifteen-year employment period.

B.

Dependahl and Healy filed suit against Falstaff and Kalmanovitz on August 8, 1975. A few months later, on

January 13, 1976, Calhoun brought suit. Essentially, all three sought both common-law and ERISA statutory relief resulting from the termination of the severance payments and alleged interference with the CBS plan. In 1977, the parties entered into a settlement agreement which was enforced, pursuant to the terminated executives' petition, by the district court. *Dependahl* v. *Falstaff Brewing Corp.*, 448 F.Supp. 813 (E.D.Mo.1978). Pending appeal to this court, the parties both stated that they wished to try the case on its merits. This court than vacated the settlement order. *Dependahl* v. *Falstaff Brewing Corp.*, 594 F.2d 869 (8th Cir. 1979).

On December 10, 1979, the district court, upon the former executives' motion, imposed discovery sanctions on Falstaff pursuant to Federal Rule of Civil Procedure 37(b). *Dependahl* v. *Falstaff Brewing Corp.*, 84 F.R.D. 416 (E.D.Mo.1979). The court struck Falstaff's affirmative defenses and counterclaims, due to Falstaff's refusal to properly and timely respond to interrogatories. Falstaff filed a timely notice of appeal from the order. On January 10, 1980, this court granted Falstaff leave to stay its appeal until the district court entered final judgment in the case.

On December 17, 1979, trial was commenced before the court, without a jury, and continued for six days. On February 15, 1980, after trial briefs were filed, the court took the matter under submission. On June 9, 1980, the court entered its order granting relief to the former executives on the ERISA and tortious-interference-with-contract claims, but denied relief on a fraud claim. *Dependahl* v. *Falstaff Brewing Corp.*, 491 F.Supp. 1188 (E.D.Mo.1980). Post-trial motions were denied by the court on July 2, 1980.

On July 15, 1980, the district court conducted a hearing on the amount of attorney fees to be awarded the former executives under the ERISA attorney feees statute. 29 U.S.C. § 1132(g) (1976). On August 28, 1980, the court entered its order and

memorandum opinion awarding $149,175 in attorney fees, and expenses of $13,000. *Dependahl* v. *Falstaff Brewing Corp.*, 496 F.Supp. 215 (E.D.Mo.1980).

C.

In its memorandum opinion of June 9, 1980, concerning the merits of the case, the district court found both the severance policy and the CBS plan to be within the coverage of ERISA. 491 F.Supp. at 1194, 1196. The court then concluded that Falstaff violated its fiduciary duty to Calhoun by changing the terms of the plan in contemplation [1212] of mass terminations. With respect to the CBS plan, the court enjoined Falstaff from borrowing against the cash values of the life insurance policies. *Id.* at 1196-97. The court awarded prejudgment interest on the severance payments at the rate of nine percent per annum.

Next, the court found Kalmanovitz liable for punitive damages in the amount of $50,000 to each former executive for tortious interference with contract involving the severance payments and the CBS plan. The trial court concluded that Kalmanovitz did not act in good faith in terminating the former executives. Accordingly, the court refused to grant Kalmanovitz any common-law privilege to induce a breach of contract. Finally, the court dismissed Dependahl's and Healy's claims that Kalmanovitz fraudulently misrepresented that they would be retained after the takeover. The court found that no misrepresentations on continuing employment were made. *Id.* at 1198-99.

II.

We first address the issue of whether the district court abused its discretion in ordering that Falstaff's affirmative defenses and counterclaims be stricken as a discovery sanction pusuant to

Federal Rule of Civil Procedure 37(b).[2] Falstaff argues that the trial court's sanctions were unduly harsh, given the factual circumstances surrounding the interrogatories posited by the former executives. Falstaff also contends that a Rule 37(b) sanction may be imposed only if a Rule 37(a) order is in force. In Falstaff's view, no such order was in effect. Our review of the record leads us to a different conclusion concerning the factual circumstances surrounding the discovery sanctions.

---

[2] Federal Rule of Civil Procedure 37(b)(2) provides:

> (2) *Sanctions by court in which action is pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule of Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
>
> * * * * * *
>
> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

[1] The district court's reported memorandum concerning the sanctions contains ample factual findings to support the imposition of sanctions. On March 27, 1978, Falstaff was ordered, pursuant to Rule 37(a), to respond to the former executives' interrogatories. The settlement negotiations then intervened. *See ante* at 1211. After the settlement was vacated, the three former executives again tried to obtain discovery. Finally, on October 11, 1979, Falstaff filed answers. These answers had been prepared a year and a half earlier. The district court concluded that

> [t]here is absolutely no excuse, however, for defendant's not having served the answers when plaintiffs renewed their request in March of 1979. To delay seven additional months during which time the answers were already prepared and ready for service is clearly inexcusable, especially in light of the obviously incomplete and evasive nature of these answers. Defendant clearly sought to delay and obstruct plaintiffs' legitimate discovery requests, **[1213]** a tactic which can not be tolerated under the voluntary scheme of discovery envisioned by the Federal Rules of Civil Procedure.
>
> * * * * * *
>
> It is apparent to this Court that defendant has engaged in a continuous pattern of delay and obstruction. It is also apparent that this delay has been caused as much by defendant itself as by its counsel. Falstaff has changed counsel numerous times, each change further delaying the orderly disposition of this lawsuit. Though this Court normally does not question a litigant's desire to change counsel, when it is done as repeatedly as has defendant in this case, this Court must strongly presume that it is done more as a dilatory tactic than in a legitimate desire to engage substitute counsel.

Dependahl v. *Falstaff Brewing Corp.*, 84 F.R.D. at 418-19.

The district court further found that the March 27, 1978, Rule 37(a) order was still in force and "carried with it the implicit condition to answer fully and completely." *Id.* at 419. We agree with the trial court that a Rule 37(a) order was in effect at the time the sanctions were imposed. We recognize that a Rule 37(b) sanction should not be imposed by the trial court unless a Rule 37(a) order is in effect. *See LaClede Gas Co.* v. *G. W. Warnecke Corp.*, 604 F.2d 561, 565 (8th Cir. 1979); *Fisher* v. *Marubeni Cotton Corp.*, 526 F.2d 1338, 1341 (8th Cir. 1975). *See generally* 4A Moore's Federal Practice ¶ 37.03[2] (2d ed. 1980). The prerequisite of a Rule 37(a) order insures that the party failing to comply with discovery is given adequate notice and an opportunity to contest the discovery sought prior to the imposition of sanctions. Here, Falstaff was apprised of its failure to comply in March 1978, over a year and a half before sanctions were imposed.

[2] We now turn to the issue of the propriety of the scope of the district court's discovery sanctions. A Rule 37(b) sanction striking affirmative defenses and counterclaims should only be imposed in strictly limited circumstances. The Supreme Court held in *Societe Internationale* v. *Rogers*, 357 U.S. 197, 212, 78 S.Ct. 1087, 1096, 2 L.Ed.2d 1255 (1958), that Rule 37

> should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner. [Footnote omitted.]

The issue before this court is not whether we would, as an original matter, have imposed the sanctions, but rather, whether the district court abused its discretion in doing so. *See National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642, 96 S.Ct. 2778, 2780, 49 L.Ed.2d 747 (1976). The

district court clearly found that Falstaff's failure to comply was due to a willful, bad-faith effort on the part of Falstaff to delay and obstruct the lawsuit. *Ante* at 1212-1213, *quoting* 84 F.R.D. at 418-19. The record fully supports these findings, as it demonstrates defendant's "flagrant bad faith" and "counsel's 'callous disregard' of their responsibilities." *National Hockey League,* 427 U.S. at 643, 96 S.Ct. at 2781. The district court's order of discovery sanctions against Falstaff is affirmed.

III.

A.

[3] With regard to the merits of the case, Falstaff first argues that the CBS plan does not fall within the coverage of ERISA. The CBS plan is a whole-life insurance plan for which Falstaff purchased insurance on approximately a dozen of its higher ranking executives. Under the terms of the plan, the named beneficiaries of a covered executive are to receive annuity income benefits upon the executive's death, with Falstaff recovering the annual premiums previously paid, with interest. The district court found the plan to be a funded employee welfare benefit plan under **[1214]** ERISA, 29 U.S.C. § 1002(1) (1976).[3] 491 F.2d at 1194-95.

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[3] 29 U.S.C. § 1002(1) provides, in relevant part:

> The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship, or other training programs, or day care centers, scholarship funds, or prepaid legal services, * * *.

Falstaff argues that the CBS plan is an excess benefit plan under 29 U.S.C. § 1002(36)[4] and that it is unfunded. Under 29 U.S.C. § 1003(b)(5), excess benefit plans, if they are unfunded, are exempt from ERISA coverage. The district court found the CBS plan to be funded, and therefore did not reach the issue of whether the plan was an excess benefit or welfare benefit plan. 491 F.Supp. at 1195.

We agree with the district court's conclusion that the plan was funded. Funding implies the existence of a *res* separate from the ordinary assets of the corporation. All whole-life insurance policies which have a cash value with premiums paid in part by corporate contributions to an insurance firm are funded plans. The employee may look to a *res* separate from the corporation in the event the contingency occurs which triggers the liability of the plan.

B.

The major issue Falstaff argues on appeal is whether the district court erred in finding Kalmanovitz liable for tortious interference with the severance policy and CBS plans under Missouri common law. Falstaff contends that ERISA preempts a state common-law tortious interference with contract cause of action with regard to ERISA pension and welfare benefit plans.

[4] ERISA preempts state laws to the extent that they relate to employee benfits which are not exempt from federal regulation.

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[4] 29 U.S.C. § 1002(36) provides:

The term "excess benefit plan" means a plan maintained by an employer solely for the purpose of providing benefits for certain employees in excess of the limitations on contributions and benefits imposed by section 415 of Title 26 on plans to which that section applies, without regard to whether the plan is funded. To the extent that a separable part of a plan (as determined by the Secretary of Labor) maintained by an employer is maintained for such purpose, that part shall be treated as a separate plan which is an excess benefit plan.

See Alessi v. *Raybestos-Manhattan, Inc.*, ___ U.S. ___, ___, 101 S.Ct. 1895, 1905, 68 L.Ed.2d 402 (1981). 29 U.S.C. § 1144 (1976) provides in pertinent part:

> (a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.
>
> * * * * * *
>
> (c) For purposes of this section:
>
> (1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

The Supreme Court recently has stated the criteria to be followed by a reviewing court in determining whether a state law is preempted by federal legislation. In *Chicago and North Western Transportation Co.* v. *Kalo Brick & Tile Co.*, ___ U.S. ___, ___, 101 S.Ct. 1124, 1130, 67 L.Ed.2d 258 (1981), the Court stated:

> [W]hen Congress has chosen to legislate pursuant to its constitutional powers, than a court must find local law preempted by federal regulation whenever **[1215]** the 'challenged state statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." ' *Perez* v. *Campbell*, 402 U.S. 637, 649 [91 S.Ct. 1704, 1711, 29 L.Ed.2d 233] (1971), quoting *Hines* v. *Davidowitz, supra* [312 U.S. 52] at 67-68 [61 S.Ct. 399, 404, 85 L.Ed. 581]. Making this determination 'is essentially a two-step process of first ascertaining the con-

> struction of the two statutes and then determining the constitutional question whether they are in conflict.' *Perez* v. *Campbell, supra* [402 U.S.], at 644 [91 S.Ct. at 1708]. And in deciding whether any conflict is present, a court's concern is necessarily with 'the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted.' *San Diego Building Trades Council* v. *Garmon, supra* [359 U.S. 236], at 243 [79 S.Ct. 773, 778, 3 L.Ed.2d 775].

Congress has explicitly set forth the broad remedial policy of ERISA. 29 U.S.C. § 1001(b) (1976) provides:

> It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

Congress therefore saw a need to set minimum, uniform national standards for employee benefit plans and to provide for uniform remedies in the enforcement of the plans. In doing so, Congress preempted all state laws which relate to employee benefit plans, not only state laws which directly attempt to regulate an area expressly covered by ERISA. *Wadsworth* v. *Whaland,* 562 F.2d 70, 77 (1st Cir. 1977) (Lay, J.), *cert. denied,* 435 U.S. 980, 98 S.Ct. 1630, 56 L.Ed.2d 72 (1978). Congress "meant to establish pension plan regulation as exclusively a federal concern," limited only by the terms of ERISA itself. *Alessi* v. *Raybestos-Manhattan, Inc.*, ____ U.S. at ____, 101 S.Ct. at 1906 (footnote omitted).

Although preemption is not lightly inferred, the broad scope of the substantive provisions of ERISA, combined with the ex-

plicit statement of federal preemption in section 1144, leads us to conclude that Congress intended to "occupy the field" of employee benefit plans. Conflicts between federal and state regulatory provisions may have one of two sources, "either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained [occupation of the field]." *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963). The first type of conflict involves a direct interference by the state law in its actual operation with the substantive policies underlying the federal legislation. The second type involves the congressional veto of state laws in areas within Congress's commerce clause powers. *See generally* L. Tribe, American Constitutional Law § 6-25 (1978). We conclude that Congress legislated an outser of all state laws relating to employee benefit plans, given the "unambiguous congressional mandate to that effect" contained in section 1144. *Florida Lime & Avocado Growers, Inc.,* 373 U.S. at 147, 83 S.Ct. at 1219. *See generally* Hutchinson and Ifshin, *Federal Preemption of State Law Under the Employee Retirement Income Security Act of 1974,* 46 U.Chi.L.Rev. 23, 38-43 (1978).

[5] The thrust of the former executives' argument against federal preemption of the state tortious interference with contract cause of action focuses on the lack of substantial damage such a cause of action would have on the overall purpose of ERISA. This argument, however, misses the point. If Congress has already provided a remedy for the violation of the former executives' benefit plans, then once Congress has expressed its intention to occupy the field, the state law is preempted, regardless of whether or not a conflict exists which **[1216]** involves a direct interference by the state law with the substantive federal legislation. Here, Congress has provided a remedy for the wrong allegedly done the former executives by Kalmanovitz. 29 U.S.C. § 1140 (1976) provides, in relevant part:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate agaisnt a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. * * * The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

Congress has preempted state law claims of tortious interference with employee benefit plans. The district court's judgment in favor of the former executives on this issue is reversed.

C.

[6] The former executives argue an alternative basis for affirmance of the district court's award of punitive damages against Kalmanovitz in this case. The former executives contend that ERISA authorizes an award of punitive damages. The district court, on October 1, 1979, in ruling upon Falstaff's and Kalmanovitz's motions for partial summary judgment, held that punitive damages are not recoverable under ERISA. *Calhoun* v. *Falstaff Brewing Corp.*, 478 F.Supp. 357, 359 (E.D.Mo.1979). In the only other reported decisions on this question, two district courts have reached different conclusions. *Bittner* v. *Sadoff & Rudoy Industries*, 490 F.Supp. 534, 536 (E.D.Wis.1980) (not excluding punitive damages); *Hurn* v. *Retirement Fund Trust*, 424 F.Supp. 80, 82 (D.C.Cal.1976) (opposite). We do not thing punitive damages are provided for in ERISA. Ordinarily punitive damages are not presumed; they are not the norm; and nowhere in ERISA are they mentioned. If Congress had desired to provide for punitive damages, it could have easily so stated, as it has in other acts. However, we need not decide this issue, because we find that punitive damages are

inappropriate in this case under either 29 U.S.C. § 1132(a) or § 1140. *Cf. International Brotherhood of Electrical Workers* v. *Foust,* 442 U.S. 42, 48-52, 99 S.Ct. 2121, 2125-26, 60 L.Ed.2d 698 (per se ban on punitive damages in union breach of fair representation suit). ERISA's section 1140 creates a federal statutory action for interference with employee benefit contracts. Congress recognized that the courts, in interpreting ERISA, would need to develop a body of federal common law to deal with the issues raised under the statute. *See Landro* v. *Glendenning Motorways, Inc.,* 625 F.2d 1344, 1351 (8th Cir. 1980). We believe that, as a matter of federal common law, an award of punitive damages is inappropriate to a claim of interference with employee benefit plans.

The common-law tort of interference with contractual relations extends back to the Ordinance of Labourers, enacted in England in 1349. The statute provided a remedy to an employer, whose laborer had run off to another employer, against the new employer. The ordinance in effect provided the legal mechanism "by which a system of compulsory labor was introduced." W. Prosser, Law of Torts § 129, at 929 (4th ed. 1971). With this ominous beginning, the tort developed in the nineteenth century, to be used as a tool by employers to prevent the formation of unions. *See* Note, *Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract, and Tort,* 93 Harv.L.Rev. 1510, 1532-33 (1980). The entire history of the tort has been to protect vested interests against the onslaught of free and open competition.

The economic significance of the tort would be limited, however, were it not for its damage provisons. Tortious interference with contract allows an injunctive remedy to be obtained in many cases. *See* **[1217]** Prosser, *supra,* at 948. In addition, monetary damages can be obtained against the interferer rather than the breaching party. Finally, some courts have allowed the award of punitive damages. *See,* Annot., 26 A.L.R.2d 1227, 1274 (1952).

The advantage to suing under the tort, rather than on the contract, results from these damage provisions. The tort allows the party who has suffered a breach to, at times, enjoin the breach and recover damages in excess of those allowed under the common law of contract. The tort also allows recovery if the party breaching the contract is unable to satisfy a contract judgment. The tort, therefore, provides an additional weapon to the potential party subject to a contractual breach to prevent or deter the breach.

Whether punitive damages should be allowed for tortious interference with contractual relations is therefore dependent upon the extent to which contractual breaches should be deterred. *See Foust, supra,* 442 U.S. at 50-51, 99 S.Ct. at 2127. The common law of contract refuses to allow an award of punitive damages. This refusal has been explained in terms of economic efficiency. So long as the party subject to the breach is compensated to the extent of his loss, there is no reason to penalize the breaching party for refusing to perform his contractual obligations. The breach frees the latter's resources to be used ina more efficient manner elsewhere. *See* Barton, *The Economic Basis of Damages for Breach of Contract,* 1 J.Leg.Stud. 277, 282-91 (1972); Dobbs, *Tortious Interference With Contractual Relationships,* 34 Ark.L.Rev. 335, 360-61 (1981).

In the present case, the district court specifically found that "Kalmanovitz was acting at all times relevant to this litigation in what he perceived to be in the interest of Falstaff and not on his own behalf." 491 F.Supp. at 1193. To the extent that Kalmanovitz intentionally interfered with the former executives' benefit plans in violation of 29 U.S.C. § 1132 and § 1140, the former executives are entitled to their actual damages. So long as Kalmanovitz acted in what he believed were the interests of Falstaff, there is no reason to impose punitive damages against him unless under the same circumstances Falstaff should be held liable for punitive damges.

The district court found that "Kalmanovitz had no justification for directing Falstaff to breach the contract." *Id.* at 1198. Thereupon the court made its award of punitive damages. This was error, for neither Kalmanovitz nor Falstaff requires any justification to breach the contract. If Falstaff chose to breach, the former executives may contest the breach by bringing suit under ERISA. If they are correct in their interpretation of the contract, then they will succeed in their suit, as they in fact have done. There is simply no reason to use punitive damages as an additional deterrent to breach of the employee benefit plan by Falstaff. *See generally* Perlman, *Interference With Contractual and Other Economic Expenditures: A Clash of Tort and Contract Theory* 38-44 (tent. draft, University of Virginia School of Law 1981).

As noted below, attorney fees and interest are available under ERISA to compensate the former executives for any financial loss they have suffered from the litigation. We also note that Falstaff and Kalmanovitz have contended that the benefit plans were terminated because the former executives were terminated "for cause" which, under the plan's terms, relieved Falstaff of any obligation. We now turn to this issue.

D.

[7] Falstaff next contends that the district court erred in finding that the former executives were not discharged for cuase. *See* 491 F.Supp. at 1192-93. Falstaff charges that the former executives engaged in unethical, if not illegal, conduct, refused to properly follow directions, and were generally responsible for the compnay's poor financial picture at the time of the takeover. The district court found these contentions to be without merit. *Id.* Our review of the record leads us to conclude that the district court's factual findings on this issue were not "clearly erroneous." *See* [1218] Fed.R.Civ.P. 52(a); *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948).

E.

[8] In their cross-appeal, Healy and Dependahl contend the district court erred in finding that their terminations from employment were not the result of a fraudulent misrepresentation by Kalmanovitz. Dependahl and Healy allege that Kalmanovitz represented taht they would be retained after the takeover. The district court "found no such misrepresentations were made." 491 F.Supp. at 1199. The record supports this factual finding. "[T]here is no evidence that Kalmanovitz ever stated that plaintiffs would be retained after the takeover." *Id.* at 1191. We agree with this conclusion.

F.

[9] Finally, the former executives assert that the district court erred in failing to render judgment on their implied claim of tortious interference with their employment contract. The former executives did not plead this cause of action in their complaint, nor did the district court make a finding on the issue. On appeal, the former executives contend that the issue was tried by the "implied consent of the parties" pursuant to Federal Rule of Civil Procedure 15(b).[5]

In *Gallon* v. *Lloyd-Thomas Co.*, 264 F.2d 821, 825 n.3 (8th Cir. 1959), we stated the relevant standards for a Rule 15(b) amendment after jdugment:

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[5] Federal Rules of Civil Procedure 15(b) provides in relevant part:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. * * *

> "The purpose of an amendment to conform to proof is to bring the pleadings in line with the actual issues upon which the case was tried; therefore, an amendment after judgment is not permissible which brings in some entirely extrinsic issue or changes the theory on which the case was actually tried, *even though there is evidence in the record—introduced as relevant to some other issue—which would support the amendment.*" (Emphasis supplied.) Vol. 3, Moore's Federal Practice § 15.13 at pp. 846-847.

Given Falstaff's record of contesting every issue in this case, it is difficult to imagine that they impliedly consented to anything the former executives raised at trial. In this case, the record reveals that neither Falstaff nor the former executives tried the action on the theory of tortious interference with the employment contracts. While Falstaff's post-trial brief did address some aspects of this issue as it related to the ERISA claims, this did not change "the theory on which the case was actually tried." *Id. See also St. Joe Minerals Corp.* v. *OSHRC,* 647 F.2d 840, 844 (8th Cir. 1981) (no amendment where a party would be denied fair opportunity to present evidence).

IV.

The district court allowed prejudgment interest on the judgments obtained by the former executives resulting from Falstaff's ERISA violation pursuant to 29 U.S.C. § 1132. The trial court allowed an interest rate of nine percent as provided by Mo.Ann. Stat. § 408.020. Falstaff contends that the court erred in doing so, because up until September 28, 1979, Missouri law provided for a six percent statutory rate. We agree that the district court erred on this issue.

[10] The question of whether interest is to be allowed, and also the rate of computation, is a question of federal law where the cause of action arises from a federal statute. *See Brooklyn Savings Bank* v. *O'Neil,* 324 U.S. 697, 715, 65 S.Ct. 895, 906, 89 L.Ed. 1296 (1945); *Perkins* v. *Standard Oil Co. of California,* 487 F.2d 672, 675 (9th Cir. 1973).

[1219] [11] ERISA itself provides no express statutory authority for the award of prejudgment interest. Nor have we been able to find any reported case dealing with the award of prejudgment interest in an ERISA case. We therefore look for guidance to another area of federal labor law.

In *Hodgson* v. *American Can Co.*, 440 F.2d 916, 922 (8th Cir. 1971), where we considered the propriety of awarding interest on a compensatory award of back wages under the Fair Labor Standards Act, 29 U.S.C. § 217 (1970), the court relied on the following factors in awarding prejudgment interest:

> Section 17 contains no language providing for either liquidated damages or interest. In the absence of an unequivocal prohibition of interest, and where the statute imposes a money obligation, the power of the court to award interest is dependent on an appraisal of the congressional purpose of imposing the obligation and on the relative equities of the parties. *Rodgers* v. *United States,* 332 U.S. 371, 68 S.Ct. 5, 92 L.Ed. 3 (1947). Clearly the award of back wages under the Fair Labor Standards Act is remedial in nature. 29 U.S.C. § 202(b), *Goldberg* v. *Wade Lahar Construction Co.,* 290 F.2d 408, 415 (8th Cir. 1961). The purpose of the award is to compensate the employees for the loss sustained because of the wrongful withholding of wages. While the good faith of the employer is one of many factors to be considered, "[t]o make such employees whole, the provision for the payment of interest for the time the back pay was wrongfully withheld from them is only equitable." *Marshfield Steel Co.* v. *N.L.R.B.,* 324 F.2d 333, 338 (8th Cir. 1963); *Shultz* v. *Wheaton Glass Co., supra,* 319 F.Supp. [229] at 234 (D.N.J.1970). Both at law and equity, interest is allowed on money due. *Miller* v. *Robertson,* 266 U.S. 243, 256-258, 45 S.Ct. 73, [78-79] 69 L.Ed. 265 (1924).
>
> From the inception of the discrimination, American Can was unjustly enriched and the female employees were

> damaged. During the entire period American Can has had the use of the money, and therefore equity and justice requires payment by way of interest for its use. The interest should be allowed from the dates of the underpayment.

We believe that these same considerations should be followed in an award of prejudgment interest with regard to an ERISA violation. The former executives have been denied their contractual severance benefits for a period of approximately four years before final judgment was rendered. Falstaff has continued to have the use of this money. Furthermore, the exact amount of the liability on the plans was never in issue. The only question was whether the employee benefit plan was binding in light of the "just cause" exception. Under these circumstances, an award of prejudgment interest is necessary in order that the plan participants obtain "appropriate equitable relief." 29 U.S.C. § 1132(a)(3)(B).

[12] A subsidiary question is the rate at which the award of interest should be computed. 28 U.S.C. § 1961 (1976) allows post-judgment interest on all civil judgments in federal court at the rate provided under state law.[6] We believe that section 1961 provides useful guidance in the area of prejudgment interest. In the interests of uniformity, we therefore hold that while federal law governs the issue of interest and its rate, state law should be incorporated in the determination of the proper rate to be allowed, once an independent finding is made concerning whether any prejudgment interest should be awarded.

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[6] Title 28 U.S.C. § 1961 provides:

Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law.

In Missouri, interest is currently allowable on all written contracts, after demand **[1220]** for payment is made, at the rate of nine percent per annum. Mo.Ann.Stat. § 408.020 (Vernon Supp.1981).[7] *See Knights of Columbus* v. *Wirtz,* 592 F.2d 466, 469 (8th Cir. 1979). Prior to September 28, 1979, the statutory rate was six percent per annum. Under a similar statute, post-judgment interest was raised on the same day from six to nine percent. Mo.Ann.Stat. § 408.040 (Vernon Supp.1981).[8] The Supreme Court of Missouri, in an *en banc* opinion, has held that this new rate should be applied prospectively only. *Senn* v. *Commerce-Manchester Bank,* 603 S.W.2d 551, 553-54 (Mo. 1980). We believe this holding would be followed with respect to section 408.020.

Prejudgment interest is to be computed at a rate of six percent per annum up until September 28, 1979, and at a rate of nine percent thereafter.

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[7] Mo.Ann.Stat. § 408.020 (Vernon Supp.1981) provides:

> Creditors shall be allowed to receive interest at the rate of nine percent per annum, when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts, and on accounts after they become due and demand of payment is made; for money recovered for the use of another, and retained without the owner's knowledge of the receipt, and for all other money due or to become due for the forebearance of payment whereof an express promise to pay interest has been made.

[8] Mo.Ann.Stat. § 408.040 (Vernon Supp.1981) provides:

> Inter shall be allowed on all money due upon any judgment or order of any court from the day of rendering the same until satisfaction be made by payment, accord or sale of property; all such judgments and orders for money upon contracts bearing more than nine percent interest shall bear the same interest borne by such contracts, and all other judgments and orders for money shall bear nine percent per annum until satisfaction made as aforesaid.

V.

[13] The final issue Falstaff raises on appeal is whether the district court abused its discretion in its award of attorney fees. The district court filed a written memorandum opinion awarding attorney fees to the former exeuctives in the amount of $149,175, and litigation expenses of $13,000. *Dependahl* v. *Falstaff Brewing Corp.*, 496 F.Supp. 215 (E.D.Mo.1980).

We have carefully studied the record, including the district court's written memorandum decision, the briefs, and the oral arguments of the parties to the appeal on this issue. We find no merit in Falstaff's arguments, and accordingly affirm the award of attorney fees on the basis of Judge Nangle's published memorandum decision. *See id.; Landro* v. *Glendenning Motorways, Inc.*, 625 F.2d 1344, 1356 (8th Cir. 1980). It particularly appears that the award of attorney fees was appropriate and reasonable, as Kalmanovitz testified at trial that Falstaff had expended close to one million dollars in attorney fees in this case. The decision of the district court on this issue is affirmed, pursuant to Rule 14 of the Rules of this court.

Affirmed in part, reversed in part, and remanded for entry of a judgment in accordance with this opinion.

APPENDIX B

(491 F.Supp. 1188)

[1188] Charles W. Dependahl, Jr., et al., Plaintiffs,

v.

Falstaff Brewing Corporation et al., Defendants.

John C. Calhoun, Plaintiff,

v.

Falstaff Brewing Corporation et al., Defendants.

Nos. 75-701C(2), 76-24C(2).

United States District Court, E. D. Missouri, E. D.

June 9, 1980.

* * * * * * * *

[1189] MEMORANDUM

NANGLE, District Judge.

Plaintiffs brough these actions alleging violations of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 to 1144, as well as common law fraud and tortious interference with contractual relations.

These cases were consolidated and tried before this Court without a jury. This Court having considered the pleadings, the testimony of the witnesses, the documents in evidence, the

stipulations of the parties, and being fully advised in the premises hereby makes the following findings of fact and conclusions of law as required by Rule 52, Federal Rules of Civil Procedure.

FINDINGS OF FACT

1. Defendant Falstaff Brewing Corporation ("Falstaff") is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in the State of California. It is actively engaged in interstate commerce.

2. Defendant Paul Kalmanovitz ("Kalmanovitz") is a resident of the State of California. Since on or about April 28, 1975, Kalmanovitz has been controlling shareholder in Falstaff, and has personally run its operations, acting a if he alone owned the corporation.

3. Plaintiff Charles W. Dependahl, Jr. ("Dependahl") is a resident of the State of Missouri. Except for a military leave of absence during World War II, he was employed by Falstaff from January 1, 1937 until May 1, 1975. From November, 1972 until his discharge, Dependahl was Vice President, Director of Marketing for Falstaff. At the time of his discharge, Dependahl's salary was forty-five thousand dollars (145,000.00) per year.

4. Plaintiff William S. Healy ("Healy") is a resident of the State of Missouri. He was employed by Falstaff from July 7, 1936 until May 1, 1975. From November, 1972 until his discharge, Healy was Vice President, Secretary and Treasurer for Falstaff. At the time of his discharge, Healy's salary was forty-five thousand dollars ($45,000.00) per year.

5. Plaintiff John C. Calhoun ("Calhoun") is a resident of the State of Missouri. He was employed by Falstaff from July 5, 1966 until August 8, 1975. From November, 1972 until his discharge, Calhoun was Comptroller for Falstaff. Additionally,

Calhoun served as Secretary and Treasurer of Falstaff from May 1, 1975 until early July, 1975. Calhoun's salary was thirty-two thousand dollars ($32,000.00) per year.

6. In 1953, Falstaff adopted the Falstaff Brewing Corporation Retirement Plan for Salaried Employees ("Pension Plan"). This Plan was revised in 1970. Under the terms of the plan, as revised, an employee's benefits become vested upon ten years employment with the Corporation. Plaintiffs Dependahl and Healy are presently receiving their benefits under the Plan. Plaintiff Calhoun was not employed by Falstaff for ten years, and therefore is not receiving benefits under the Plan.

7. Prior to 1953, Falstaff purchased life insurance policies on covered employees, those employees holding a vested interest in the policies. Dependahl has requested, but has yet to receive, the cash value of pre-1953 policies issued by the Travelers Insurance Company. The paid-up value of these policies is five thousand five hundred ninety-eight dollars ($5,598.00).

8. The Falstaff Severance Policy No. III-50 ("Severance Policy") was duly adopted by Falstaff on March 1, 1973, and was in effect at the time of the discharges of Dependahl and Healy. This Policy was included in the Falstaff Policy Manual which was circulated to all employees.

9. Under the terms of this Severance Policy, upon involuntary termination of employment with Falstaff, an employee is entitled to one week's salary for each completed year of service, up to a maximum of twenty-six weeks' salary. These benefits are completely forfeited if the employee is terminated involuntarily for violations of normal decency, such as fighting or gross insubordination. If the employee is terminated involuntarily due to "inadequate performance or similar reasons controllable by the employee", the employee is entitled to two weeks' salary as severance pay.

10. The Severance Policy was amended in June, 1975 to provide that no benefits are payable unless the employee had been with Falstaff for at least fifteen years. The Policy was changed at Kalmanovitz's direction, in anticipation of mass firings of Falstaff employees, in order to deprive Falstaff employees of their rightfully entitled benefits.

11. On DEcember 19, 1966, Falstaff adopted a death benefit plan for key employees which entailed the purchase of split-dollar insurance policies on the lives of the employees covered. On December 27, 1972, this split-dollar plan was replaced with a plan entitled the Contractual Benefit Plan for Survivors of Selected Executives of Falstaff Brewing Corporation ("CBS Plan"). Under the terms of this Plan, the named beneficiaries of the executive are to receive annuity income benefits upon the executive's death, with Falstaff recovering the annual premiums previously paid, with interest. Benefits are forfeitable upon discharge for proper cause, which includes, but is not limited to, failure to perform assigned duties with reasonable skill and diligence, gross misconduct or conviction of a felony.

12. This Plan is funded through the puchase, by Falstaff, of life insurance policies on the lives of the approximately twelve to fifteen executives covered by the Plan. Initially, the premiums were paid through utilization of the cash values of the previous split-dollar policies. Since the adoption of the CBS Plan, Falstaff has occasionally borrowed against the cash value of the policies purchased pursuant to the Plan to make premium payments thereunder.

13. Under the CBS Plan, life insurance in the amount of three hundred fifty thousand dollars ($350,000.00) was purchased on the life of Dependahl, four hundred thousand dollars ($400,000.00) on the life of Healy, and two hundred fifty thousand dollars ($250,000.00) on the life of Calhoun. Each plaintiff executed a separate Death Benefit Agreement with Falstaff in accordance with this Plan.

14. Plaintiffs played no significant roles in the adoption of the Severance Policy or the CBS Plan.

15. Falstaff's initial contact with Kalmanovitz came in the fall of 1974. At that time an agreement was worked out whereby Kalmanovitz's General Brewing Company purchased Falstaff's San Francisco Brewery and contracted to produce beer for Falstaff on the West Coast. At that time, Kalmanovitz indicated an interest in investing in Falstaff in the future.

16.Later in the fall of 1974 Falstaff was experiencing severe financial problems. In its search for an infusion of new capital, Kalmanovitz was contacted. A series of meetings between Kalmanovitz and Falstaff executives culminated in an agreement dated March 10, 1975 whereby Kalmanovitz, in return for voting control of Falstaff, would invest ten million dollars ($10,000,000.00) in Falstaff preferred stock, and would personally guarantee ten million dollars ($10,000,000.00) of Falstaff's debts. This agreement quite likely saved Falstaff from financial collapse.

17. Negotiating on behalf of Falstaff were Ferdinand Gutting, Arthur Tonna, and James McClellan. Plaintiffs had no contact with Kalmanovitz or his representatives during the course of the negotiations.

18. During the course of the negotiations Kalmanovitz represented to the Falstaff negotiators, in general terms, that he was satisfied with the basic operations of Falstaff and that no drastic changes would be made. He further stated that he would be involved only in major policy decisions and not the day-to-day operations of Falstaff. These statements were clearly false when made, as Kalmanovitz intended from the very beginning to run Falstaff as his personal fiefdom and drastically alter its operations. However, though Kalmanovitz told Gutting that Gutting would be retained, there is no evidence that Kalmanovitz ever stated that plaintiffs would be retained after the takeover.

19. The agreement with Kalmanovitz called for the issuance of a new series of preferred stock. To consummate this ageement, the Articles of Incorporation had to be amended with stockholder approval. A stockholders' meeting was held on April 28, 1975, at which time the Kalmanovitz deal was approved by the stockholders.

20. Prior to this meeting, Dependahl and Healy made extensive efforts to rally support for the agreement among the stockholders. Due to the importance of the agreement and the shortness of time prior to the meeting, the efforts made by Dependahl and Healy were more extensive and concentrated than usual. These efforts were expended by these plaintiffs while acting under the mistaken, although understandable, assumption that they would be retained after Kalmanovitz took over.

21. Dependahl first met Kalmanovitz at a dinner meeting on April 27, 1975. At this meeting, Kalmanovitz discussed several items with Dependahl. Kalmanovitz was **[1192]** unimpressed with Dependahl's knowledge of the legal and marketing aspects of beer sales, and was unhappy with Dependahl's independence of ideas and refusal to blindly agree to all Kalmanovitz said. Kalmanovitz decided to terminate Dependahl at this time.

22. After this dinner meeting, while discussing with Tonna the possibiltiy of firing a large number of Falstaff employees, Kalmanovitz was first made aware of the existence of the Severance Policy. Even though it was late at night, he ordered that he immediately be shown a copy of the Policy. The next morning Kalmanovitz inquired of McClellan, Falstaff's counsel, whether the Policy was legally binding and enforceable, and whether it could be terminated. He was advised that it was binding and enforceable.

23. Healy first met Kalmanovitz at the meeting of the Falstaff Board of Directors which followed the stockholders' meeting of April 28, 1975. At that meeting, Healy gave a lengthy report on

the financial condition of the company. Kalmanovitz was unimpressed with Healy's presentation, and dissatisfied with Healy's inability to immediately responded to Kalmanovitz's unreasonable demand to know the cash position of the company at that time. As with Dependahl, Kalmanovitz determined to terminate Healy on the basis of this first impression.

24. Upon consummation of the agreement between Kalmanovitz and Falstaff, Kalmanovitz immediately took over day-to-day operations of the company. On May 1, 1975, Dependahl and Healy, along with other executives, were discharged by Tonna on Kalmanovitz's orders. At the time of their discharge, Dependahl and Healy were informed that they would receive the maximum twenty-six weeks' of severance pay. They received four weeks' severance pay but payments were then stopped.

25. Dependahl and Healy were not discharged due to inadequate performance of their duties or for any other "cause". Quite simply, they were discharged due to a change in ownership and management and consequent change in policies and personnel.

26. After Healy's discharge, Calhoun took over the positions of Secretary and Treasurer. In these positions, as well as his retained position of Comptroller, Calhoun was charged by Kalmanovitz with the responsibility of changing the accounting system from the centralized, computerized system then in use by Falstaff to a decentralized, manual system similar to those utilized in many of Kalmanovitz's other brewery operations. Calhouns efforts to accomplish this change did not meet with Kalmanovitz's approval. Kalmanovitz wanted the change accomplished rapidly, but Calhoun proceeded with the caution to be expected in the face of such a majcr corporate change.

27. Kalmanovitz's dissatisfaction with Calhoun was further magnified due to an incident involving deferral of current debts by Continental Can. Continental Can, upon personal guarantee of the debt by Kalmanovitz and his wife, agreed to a one hun-

dred twenty day deferral of current debts. This debt amounted to approximately eleven million dollars ($11,000,000.00), which was ultimately represented by a note executed by Falstaff in mid-August, 1975. Prior to the execution of the note, however, Kalmanovitz requested Calhoun to list the debt as a long-term liability rather than a short-term debt. Without such a change, Falstaff risked default on debts to various lenders, due to conditions in the mortgages regarding current assets-current liabilities ratios. Calhoun resisted the change, maintaining that such a change was improper without an executed note. Again, this Court must believe that Calhoun's response to Kalmanovitz's demand was proper and ethical.

28. Calhoun was discharged by Tonna upon Kalmanovitz's orders on August 8, 1975. The reasons assigned for the discharge were Calhoun's actions with respect to the decetralization project and the Continental Can transaction. These reasons came into play to some extent, but the overriding consideration for Calhoun's discharge **[1193]** was, similar to the dischages of Dependahl and Healy, a change in management and a preplanned change in personnel. Kalmanovitz gave Calhoun only the slighest chance to fit into the new management scheme, and when he did not fit in he was discharged. As with Kalmanovitz's first impression of Dependahl, Calhoun's insistence upon ethics and caution conflicted with Kalmanovitz's desire that his subordinates blindly follow his orders, regardless of their correctness or propriety. There is no evidence to support Calhoun's assertion that he was discharged to prevent the vesting of his pension benefits.

29. Since Calhoun had not been employed by Falstaff for fifteen years, as required by the Severance Policy as amended in June, 1975, he did not receive any severance pay from Falstaff.

30. Subsequent to the dismissal of Healy and Dependahl, Kalmanovitz maliciously, unfairly, and without any justification whatsoever directed that severance payments to them be

stopped. Falstaff subsequently offered to Dependahl and Healy to resume severance payments if they would waive their interests in the CBS Plan. Dependahl and Healy refused to do so, and the severance payments were never resumed.

31. Falstaff and Kalmanovitz have consistently maintained throughout this litigation and others that the CBS Plan is not vaid and binding with respect to plaintiffs. This contention is based to a large extent on various allegations of impropriety and misconduct charged to plaintiffs, which allegations have been stricken from this case due to defendants' failure to comply with discovery requests concerning these matters. See Order of December 10, 1979. 84 F.R.D. 416. In any event, this Court has serious doubts as to the bona fides of these contentions. In fact, Kalmanovitz has consistently sought to complicate this lawsuit at every chance and to delay its progress by every means possible. Clearly, these actions, as well as Kalmanovitz's original decision not to honor the CBS Plan, have been taken in an effort to force plaintiffs into submission, and in willful and wanton disregard of plaintiffs' rights.

32. Kalmanovitz was acting at all times relevant to this litigatin in what he perceived to be the interest of Falstaff, and not on his own behalf. It is also apparent, however, that Kalmanovitz firmly believes that whats good for "Mr. Paul" is good for Falstaff.

38. Falstaff and Kalmanovitz exercise control over the management of the Severance Policy and CBS Plan and the disposition of any assets included therein.

CONCLUSIONS OF LAW

This Court has jurisdiction of this case pursuant to 29 U.S.C. § 1132(e)(1), and 28 U.S.C. § 1332. This case involves plaintiffs' efforts to define and enforce their rights in plans allegedly covered by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001 to 1144, as well as several

common law counts between citizens of different states involving more than ten thousand dollars ($10,000.00).

Before proceeding to a discussion of the merits of the various counts in this action, this Court must discuss the effect to be given to numerous "admissions" on the part of defendants, which plaintiffs have placed into evidence in this case. These admissions cover every substantive element of plaintiffs' causes of action, and were these admissions given full force and effect a trial would have been totally redundant and cumulative.

Plaintiffs initially filed the request for admissions on February 28, 1978, and a response was therefore due on March 30 of that year. Prior to that date, however, plaintiffs raised the issue of a purported settlement. A hearing was held on plaintiffs' motion to enforce that settlement on April 10, 1978, and the settlement was enforced by this Court on April 18, 1978. 448 F.Supp. 813. During the pendency of an appeal of that order, plaintiffs abandoned their efforts and the settlement was vacated on February 26, 1979. 594 F.2d 869.

Though no formal stay of proceedings was entered during the course of the litigation **[1194]** of the "settlement" question, the parties ceased all discovery efforts. On March 9, 1979, shortly after the Eighth Circuit's remand, defendants lodged their answers to plaintiffs' requests for admissions with this Court. On June 5, 1979, defendants were granted leave to file those responses.

Plaintiffs now assert that the admissions are conclusive against defendants due to defendants' failure to file a motion to withdraw their "admissions", pursuant to Rule 36(b), Federal Rules of Civil Procedure. These "admissions" allegedly arose from defendants' failure to deny the requests within thirty days. See Rule 36(a), Federal Rules of Civil Procedure. This Court will not give such conclusive weight to the admissions.

[1] Plaintiffs have been fully aware throughout the course of this litigation that defendants denied the substance of the admissions. The admisisons go to the very heart of plaintiffs' claims, which claims were fully denied in defendants' answers to the complaint. Furthermore, defendants responded to this same set of admissions in a companion case now pending before a different judge in this district. After the filing of defendants' response in this case, plaintiffs gave no indication that they considered the matters admitted due to a lack of appropriate motion. Defendants' failure to timely deny is undoubtedly attributable in large part to plaintiffs' effort to enforce the settlement, and subsequent abandonment of that effort.

Under these circumstances it would be extremely unfair[1] to allow plaintiffs to prove the bulk of their case through these contested admissions. Though defendants never filed a formal motion to withdraw their "admissions", their denial has been obvious throughout this litigation. Furthermore, plaintiffs, despite any reliance on the admissions, placed into evidence that proof which they could garner to support their case, and the issues covered by the admissions were fully litigated. This Court had, therefore, considered the admissions as evidence in this case, but has not considered the matters included therein as conclusively established against defendants. *Warren* v. *International Broth. of Teamsters, Inc.*, 544 F.2d 334 (8th Cir. 1976); *Pleasant Hill Bank* v. *United States of America*, 60 F.R.D. 1 (W.D.Mo.1973).

THE CBS PLAN

[2] Counts I and II of both complaints seek declaratory and injunctive relief with respect to the CBS Plan. The initial issue to be decided is whether the Plan does, in fact, fall within the

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[1]This court must concede, however, that it is with some reluctance that it concludes that defendants are entitled to any measure of equity in light of their conduct throughout this litigation.

coverage of ERISA as plaintiffs claim. Defendants raise numerous arguments as to why the Plan does not fall within ERISA, but this Court must conclude that those arguments are without merit.

ERISA applies to any employee benefit plan established or maintained by an employer engaged in commerce. § 4 of ERISA, 29 U.S.C. § 1003. An "employee benefit plan" is an employee welfare benefit plan or an employee pension plan, or a plan that is both an employee welfare benefit plan and an employee pension benefit plan. § 3(3) of ERISA, 29 U.S.C. § 1002(3).

Section 3(1) of ERISA, 29 U.S.C. § 1002(1), defines an "employee welfare benefit plan" to include

> . . . any plan . . . which was heretofore or is hereafter established or maintained by an employer . . . to the extent that such plan . . . was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) . . . benefits in the event of . . . death . . ..

There can be no doubt that the CBS Plan was established by Falstaff to provide, through the purchase of insurance, benefits to the participants' beneficiaries upon the **[1195]** participants' death. The CBS Plan is clearly an employee welfare benefit plan as defined in ERISA.

Plaintiffs also argue that the CBS Plan qualifies as an employee pension benefit plan, as that term is defined in Section 3(2) of the Act. 29 U.S.C. § 1002(2). Though this Court has serious doubts as to the validity of this contention, this issue need not be decided at this time. CBS Plan is covered by ERISA due to its status as an employee welfare benefit plan, andits also being considered an employee pension benefit plan would not change the outcome of this case.

Defendants argue initially, however, that the CBS Plan is merely a series of individual agreements and not a "plan". This argument is specious. The CBS Plan was adopted by Falstaff as a unitary scheme for participation by all covered executives. Falstaff did not devise an individual death benefit agreement each time it decided that an executive should be covered. In a similar vein, defendants argue that the CBS Plan is not within ERISA because there is no single written document embodying the Plan, as required by Section 402 of the Act. 29 U.S.C. § 1102(a)(1). Defendants miss the point. If the CBS Plan falls within ERISA, as this Court concludes that it does, defendants may not avoid the requirements of that Act by merely failing to comply and then arguing that the Plan is not within the Act due to their noncompliance.

Defendants next argue that the CBS Plan is excluded from ERISA coverage as an unfunded excess benefit plan, pursuant to § 4(b)(5) of ERISA. 29 U.S.C. § 1003(b)(5). Defendants claim that the CBS Plan is an excess benefit plan since the empl;oyees are already covered by the Falstaff Pension Plan. This simplistic argument is without merit. Whether a plan is an "excess benefit plan" as defined by ERISA is determined by whether the benefits and contributions are in excess of those allowed by the Internal Revenue Code. 29 U.S.C. § 1002(36). Neither party has attempted to unravel the maze of the Internal Revenue Code, and this Court likewise finds it unnecessary to do so, for it is clear that the CBS Plan is not unfunded.

The CBS Plan is financed through the purchase of insurance policies on the lives of the key executives covered. Though ERISA does not define "unfunded", this Court must conclude that the instant plan is "funded" within the meaning of that statute. Guidance is supplied by the applicable regulations.

Section 104(a)(3) allows the Secretary of Labor, by regulation, to exempt certain employee welfare benefit plans from the reporting and disclosure requirements of the Act. 29 U.S.C. §

1024(a)(3). Pursuant to this authority, the Secretary has promulgated a regulation which applies directly to plans such as the CBS Plan. 29 C.F.R. § 2520.104-24 specifically exempts from the reporting and disclosure requirements employee welfare benefit plans which are maintained by the employer primarily for the purpose of providing benefits to a select group of management and for which benefits are provided exclusively through insurance policies, the premiums for which are paid directly from the employer's general assets. The CBS Plan fits squarely within this exemption. The fact that the CBS Plan is exempted from this part of ERISA necessarily implies that it is otherwise included within the Act's coverage.

This regulation, along with others, also seems to equate "unfunded" with payment of benefits from the employer's general assets. See also, for example, 29 C.F.R. § 2520.104-20. This correlation is entirely reasonable. In the case of the CBS Plan, for example, the benefits will eventually be paid through the insurance contracts purchased and maintained by payments by Falstaff. Through these payments Falstaff has allowed the insurance companies to accumulate a fund for the eventual payment of benefits. This Court must conclude, therefore, that the CBS Plan is not an unfunded excess benefit plan exempt from ERISA.

Lastly, defendants argue that ERISA does not apply to "key man" plans such as the CBS Plan. There is no support in the **[1196]** statute for this conclusion. Though unfunded key man plans are excluded from various parts of the Act, 29 U.S.C. §§ 1051(2), 1081(a)(3), and 1101(a)(1), there is no exclusion from ERISA in general for such plans. In any event, the CBS Plan is not unfunded.

Plaintiffs seek declaratory and injunctive relief with respect to the CBS Plan. Section 502 of ERISA permits a participant in a covered plan to bring a civil suit to clarify his rights to future benefits in the plan and to enjoin any act which violates the

terms of ERISA or the plan. 29 U.S.C. § 1132(a)(1)(B) and (a)(3)(A). Plaintiffs have clearly shown that the CBS Plan is covered by ERISA and that it is binding and enforceable. They have also shown that they were not discharged due to failure to perform assigned duties with reasonable skill and diligence, gross misconduct, or conviction of a felony. Furthermore, defendants have indicated a desire and intent to terminate the Plan unless enjoined from doing so. Appropriate declaratory and injunctive relief to prevent termination of the Plan and to keep the Plan in full force and effect will therefore be granted. Both Falstaff and Kalmanovitz are fiduciaries with respect to the CBS Plan, 29 U.S.C. § 1002(21), and the declaratory and injunctive relief will therefore be directed toward each of them.

Plaintiffs also seek various other forms of injunctive relief. As to the majority of these requests, this Court believes that such relief is not appropriate. The relief which will be granted will fully protect plaintiffs' interests in the Plan, thereby rendering portions of the relief requested unnecessary. As to other portions, plaintiffs have failed to prove the alleged violations of ERISA, or have failed to show the necessity of injunctive relief.

Plaintiffs have shown, however, that defendants have borrowed money from the CBS Plan in the past, and, unless enjoined, are likely to do so in the future. Such borrowings violate the fiduciary responsibilites of ERISA. Section 406 prohibits the lending of money between a plan and a party in interest. 29 U.S.C. § 1106(a)(1)(B). Defendants are clearly parties in interest. 29 U.S.C. § 1002(14). Such borrowings will therefore be enjoined.

THE SEVERANCE POLICY

This Court has previously ruled that the Severance Policy is an employee welfare benefit plan within the coverage of ERISA, 478 F.Supp. 357, and, despite defendants' continued arguments to the contrary, that conclusion will not be changed. Section 3 of ERISA specifically includes within the coverage of ERISA

plans which provide the benefits described in 29 U.S.C. § 186(c). 29 U.S.C. § 1002(1)(B). That section, in turn, specifies severance pay as one of the enumerated benefits. See, also, 29 C.F.R. 2510.3-1(a)(3). Furthermore, in *Donnelly* v. *Aetna Life Ins. Co.*, 465 F.Supp. 696 (E.D. Pa.1979), a severance pay plan set out in the employer's Personnel Policy Manual, similar to that involved in this case, was held to be an employee welfare benefit plan within the coverage of ERISA. The Falstaff Severance Policy is clearly covered by ERISA.

Plaintiffs Dependahl and Healy seek to recover, pursuant to 29 U.S.C. § 1132(a)(1)(B), the nineteen thousand seven hundred fifty dollars ($19,750.00) still owing under the Severance Policy. Thsi amount represents the twenty-two weeks' pay withheld by defendant Falstaff. Plaintiffs Dependahl and Healy are clearly each entitled to this amount according to the terms of the Severance Policy in effect at the time of their discharge, and judgment will accordingly be entered. They were discharged due to a change in management and personnel, not because of any "cause" which would discharge Falstaff's liability under the Policy.

A different situation is presented, however, with respect to plaintiff Calhoun. Prior to his discharge, Falstaff's Severance Policy was changed. At the time of his discharge, the Policy provided that employees terminated prior to fifteen years employment with Falstaff were not entitled to severance pay. This change was made, however, in contemplation of the mass firings eventually carried out by Falstaff.

[1197] Such a change in the Policy is a clear violation of Falstaff's responsibility to discharge its duty as fiduciary in the sole interest of beneficiaries and for the exclusive purpose of providing benefits to beneficiaries and defraying reasonable expenses. 29 U.S.C. § 1104(a)(1); 478 F.Supp. at 360-361. Falstaff's alteration of the Policy was for Falstaff's benefit alone. Such a change will not be permitted to divest plaintiff Calhoun of his otherwise entited benefits.

This decision does not mean that an employer may never cut back on benefits previously provided to employees. This Court merely holds that such a change is not permissible when made expressly in contemplation of actions which would otherwise entitle employees to the previously provided benefits.

Plaintiff Calhoun will therefore be awarded the amount he would have received were it not for the change in the Policy. That amount in nine weeks' pay, or five thousand five hundred thirty-four dollars ($5,534.00).[2] As with plaintiffs Dependahl and Healy, Calhoun was not discharged for any reason which would justify Falstaff's withholding of severance pay.

Plaintiffs are also entitled to pre-judgment interest on these amounts. The Severance Policy was a contract to pay a fixed amount of money at a certain date, the breach of which entitles plaintiffs to recovery of the principal amount, plus interest from the date of the breach. *Royal Indemnity Co.* v. *United States,* 313 U.S. 289, 61 S.Ct. 995, 85 L.Ed. 1361 (1941); *Sebree* v. *Rosen,* 374 S.W.2d 132 (Mo.1964); § 408.020 R.S.Mo. (1979). As to plaintiff Calhoun, the interest shall run from August 8, 1975, the date of his dismissal and denial of benefits. As to plaintiffs Dependahl and Healy, the interest shall run from June 4, 1975, the date on which Kalmanovitz and Falstaff informed these plaintiffs that the payments were terminated. A rate of nine percent (9%) will be allowed. § 408.020 R.S.Mo. (1079).

OTHER CLAIMS

A. Plaintiff Calhoun seeks extensive declaratory and injunctive relief, with respect to the Pension Plan, as well as damages for

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[2]Plaintiff Calhoun seeks essentially this same relief in Count IV of his complaint, under the theory that defendants breached their fiduciary duty with respect to the Policy. As judgment will be entered in plaintiff Calhoun's favor on Count III of his complaint, Count IV is superfluous and judgment will be entered in defendants' favor on that count.

defendants' action with respect to the Plan. Calhoun claims that he was discharged solely to prevent the vesting of his pension benefits. Were that so, the relief requested might well be appropriate. 478 F.Supp. at 359-360. Section 510 of ERISA prohibits the discharge of any employee to prevent the attainment of any rights to which the employee may become entitled. 29 U.S.C. § 1140.

[3] In order to sustain his cause of action, however, Calhoun must carry the burden of proving that he was discharged to prevent the vesting of his pension benefits. *Moore* v. *Home Ins. Co.*, 601 F.2d 1072 (9th Cir. 1979). He has failed to do so. Judgment will be entered for defendants on Counts VI, VII, and VIII of Calhoun's complaint.

B. Plaintiffs Dependahl and Healy also seek damages for defendants' alleged violation of Section 510 of ERISA. As to the majority of the relief requested, plaintiffs' prevailing as to the Severance Policy and CBS Plan eliminates any damage. In any event, this Court does not believe that defendants have violated Section 510 with respect to plaintiffs Dependahl and Healy.

[4] It is true that defendants have refused to pay benefits to which these plaintiffs are entitled, and have refused to recognize the validity of the CBS Plan. Plaintiffs' appropriate course of action for such refusals lies in Section 502 of ERISA, which allows them to sue to enforce the plans or the Act, to recover benefits which are owing, or to obtain a declaration as to their rights in the plans. 29 U.S.C. § 1132.

Section 510 of ERISA is directed to an entirely different problem. That section **[1198]** prohibits actions taken against a plan participant or beneficiary in retaliation for that person's exercising any rights under the Act or the plan, or to interfere with the attainment of any rights to which the person may become entitled. There is no evidence that defendants have taken any such actions with respect to plaintiffs. Defendants have refused to pay benefits to which plaintiffs are entitled; they have not interfered

with the *attainment* of any rights or *retaliated against* plaintiffs due to their exercise of any rights. Judgment will therefore be entered for defendants on Count IV of plaintiffs Dependahl's and Healy's complaint.

C. Plaintiffs seek substantial actual and punitive damages from Kalmanovitz for his alleged tortious interference with their contractual relations with Falstaff. Plaintiffs allege that Kalmanovitz is liable under this theory due to his obstruction of Falstaff's relations with plaintiffs with respect to the plans at issue in this case.

[5] The elements of such a cause of action are well settled in Missouri. In order to prevail, plaintiffs must prove five elements:

> (1) A contract or valid business relationship or expectancy (not necessarily a contract);
>
> (2) Defendant's knowledge of the contract or relationship;
>
> (3) Intentional interference by the defendant inducing or causing a breach of the contract or relationship;
>
> (4) The absence of justification; and
>
> (5) Damages resulting from defendant's conduct.

Salomon v. *Crown Life Ins. Co.*, 536 F.2d 1233, 123 (8th Cir.) cert. denied, 429 U.S. 961, 97 S.Ct. 387, 50 L.Ed.2d 329 (1976); *Francis Chevrolet Co.* v. *General Motors Corp.*, 602 F.2d 227, 230 (8th Cir. 1979). It is clear that all the above elements are met in this case. This Court has found that the Severance Policy and CBS Plan were valid and enforceable contracts between plaintiffs and Falstaff. Kalmanovitz obviously knew of these contracts. The refusal of Falstaff to honor them was at the express direction of Kalmanovitz. This Court has found that Kalmanovitz had no justification for directing Falstaff to breach the contract. Lastly, it is clear that plaintiffs lost benefits to which they were entitled due to Kalmanovitz's actions.

[6, 7] Kalmanovitz, however, was acting at all times in his capacity as controlling shareholder of Falstaff. As such, he was privileged to induce a breach of the contracts in question, "provided that no improper means are used, the defendant acts in good faith to protect the corporation and does not act for his own personal benefit". *Nola* v. *Merollis Chevrolet Kansas City, Inc.*, 537 S.W.2d 627, 634 (Mo.App.1976). This Court can not conclude that Kalmanovitz was acting in good faith. His actions were taken maliciously and unjustifiably. Throughout this litigation, Kalmanovitz has shown nothing but contempt for the welfare and rights of plaintiffs, as well as for the normal rules of procedure and ethics in this Court. See Order of December 10, 1979. 84 F.R.D. 416. After living with these cases for over four years, this Court is left with the definite and firm conviction that Kalmanovitz enjoys the hardships he has forced upon plaintiffs. Due to this lack of good faith, Kalmanovitz forfeits his privilege to induce Falstaff to breach the contracts in question.

Plaintiffs have clearly been damaged due to the loss of the benefits to which they were entitled. Through this Court's decision on other counts of these cases, however, plaintiffs' actual damages have been eliminated. Kalmanovitz's bad faith and malicious intent justify the imposition of substantial punitive damages in these actions. Judgment will be entered in the amount of fifty thousand dollars ($50,000.00) for each plaintiff against Kalmanovitz as punitive damages on Count IX of Calhoun's complaint and Count V of Dependahl's and Healy's complaint.

D. Plaintiffs Dependahl and Healy seek substantial actual and punitive damages for Kalmanovitz's alleged fraudulent misrepresentations during the negotiations leading up to his purchase of controlling interest in [1199] Falstaff. This claim arises from Kalmanovitz's alleged misrepresentations as to his intent to retain Dependahl and Healy after the takeover. This Court has found that no such representations were made. Judg-

ment will therefore be entered for Kalmanovitz on Count VI of Dependahl's and Healy's complaint.

E. Finally, consideration of plaintiffs' request for attorneys' fees will be deferred until after an appropriate hearing. As prevailing parties, they are entitled to fees pursuant to Section 502(g) of ERISA. 29 U.S.C. § 1132(g). The calculation of attorneys' fees in this action will be more complicated than usual due to the inter-relationship of this case with others brought by similarly situated individuals, the complicated nature of this suit, and the complex proceedings it engendered. It is clear, however, that many hours of legal work were required of plaintiffs' attorneys because of defendants's uncooperativeness and recalcitrance. This aspect of these proceedings will, of course, be fully considered when attorneys' fees are awarded herein.

[357] APPENDIX C

(478 F.Supp 357)

John C. Calhoun,
Plaintiff and
Counterdefendant,

v.

Falstaff Brewing Corporation, Paul Kalmanovitz, Falstaff Brewing Corporation Revised Salaried Employee Retirement Plan, Contractual Benefit Plan, Falstaff Brewing Corporation Corporate Severance Policy No. III-50, Boatmen's National Bank of St. Louis and Falstaff Brewing Corporation, Defendants and Counterclaimant.

No. 76-24C(2).

United States District Court,
E. D. Missouri, E. D.

Oct. 1, 1979.

* * * * * * * *

[358] Carroll J. Donohue, Husch, Eppenberger, Donohue, Elson & Cornfeld, St. Louis, Mo., for plaintiff.

Frederick M. Switzer, Fordyce & Mayne, St. Louis, Mo., for defendants.

MEMORANDUM

NANGLE, District Judge.

This case is now before the Court on the motions of defendants Falstaff Brewing Corporation ("Falstaff") and Paul

Kalmanovitz ("Kalmanovitz") for partial summary judgment, which may be more properly considered motions to dismiss or motions to strike. Plaintiff brought this suit alleging violations by the defendants of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 to 1144, as well as alleging several common law counts. Defendant Falstaff, in response, asserted [359] counterclaims seeking declaratory and monetary relief with respect to the benefit plans in issue, as well as alleging breach of fiduciary duty by plaintiff while in the employ of defendant.

[1] The first motion of defendants Falstaff and Kalmanovitz for partial summary judgment relates to Count IV of plaintiff's complaint. In that count, plaintiff seeks actual and punitive damages for defendants' alleged violations of ERISA with respect to the Falstaff Brewing Corporation Corporate Severance Policy Number III-50 ("Severance Plan"). Punitive damages are not recoverable under ERISA and therefore defendants' motion for partial summary judgment with respect to plaintiff's prayer for such damages will be granted. *Hurn* v. *Retirement Fund Trust of Plumbing, etc.*, 424 F.Supp. 80 (C.D.Cal.1976). This same result is dictated as to defendants' motion for summary judgment with respect to the prayer for punitive damages in Count VII of plaintiff's complaint.

These defendants next move for summary judgment on Count V of plaintiff's complaint. This count asserts a cause of action for breach of contract against defendants due to their revision with the Severance Plan so as to make plaintiff eneligible. Counts III and IV of plaintiff's complaint allegte that the same transactions constituted a violation of ERISA. Section 1144 of Title 29 U.S.C. provides that ERISA preempts all state laws, including court decisions, with respect to employee welfare benefit plans covered by the Act.

[2] It is clear that the Severance Plan in question qualifies as an "employee welfare benefit plan" within the meaning of 29

U.S.C. § 1002(1). This subsection defines "employee welfare benefit plan" as:

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, . . .
>
> (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

Section 186(c), in turn, includes

> money or other thing of value paid by an employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, *severance,* or similar benefits, . . . (emphasis added)

Since this Severance Plan is within the coverage of ERISA, plaintiff's count alleging breach of contract will be dismissed. Such dismissal moots defendants' other motions for summary judgment with respect to this count, and those motions will therefore be denied.

[3] Falstaff and Kalmanovitz next move for summary judgment on Counts VI and VIII of plaintiff's complaint. In these counts, plaintiff seeks declaratory and injunctive relief on its claims that defendants violated Section 510 of ERISA, 29 U.S.C. § 1140. Plaintiff alleges that defendants discharged him after more than nine years of satisfactory service, for no reason other than to prevent him from attaining vested rights under the Falstaff Brewing Corporation Revised Salaried Employees Retirement Plan ("Pension Plan").

29 U.S.C. § 1140, Section 510 of ERISA, provides that:

> *It shall be unlawful for any person to discharge,* fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this sub-chapter, section 1201 of this title, or the Welfare and Pension Plan Disclosure Act, or *for the purpose of interfering with the attainment of any right to which such participant may become entitled* under the plan, this subchapter, or the Welfare and Pension Disclosure Act. . . . (emphasis added)

Plaintiff's allegations clearly state a cause of action under this section. Indeed, practices of the sort presently alleged may have **[360]** been one of the prime targets of ERISA. See, for example, 2 Pension Plan Guide, (CCH) ¶ 9101, where it is stated that:

> One target of the Pension Reform Act was the practice, however widespread, of terminating employees to prevent them from qualifying for pensions. The Pension Reform Act, of course, does not guarantee employment, but it does make it unlawful to discharge, fine, suspend, expel, discipline or discriminate against any participant for the purpose of interfering with the attainment of any right to which he may become entitled under his pension plan, the Pension Reform Act, or the generally superseded Welfare and Pension Plan Disclosure Act . . ..

Whether or not plaintiff's rights were vested within the meaning of ERISA at the time of his discharge is irrelevant to this cause of action. 29 U.S.C. § 1140, which made defendants' alleged actions illegal, was in effect at the time of those actions. *Reiherzer* v. *Shannon,* 581 F.2d 1266 (7th Cir. 1978). Therefore, defendants' motions for summary judgment as to Counts VI and VIII will be denied. This conclusion is supported by the recent order in the related case of *Baer* v. *Falstaff Brewing Corporation, et al.,* No. 76-913(1) (E.D.Mo. Aug. 30, 1979), in which a similar motion for summary judgment was denied.

[4] In Count VII of plaintiff's complaint, plaintiff seeks monetary relief for defendants' alleged violation of 29 U.S.C. § 1140, as alleged in Counts VI and VIII. Defendants move for summary judgment on this count on the ground that plaintiff is able to obtain all necessary relief under other counts. Plaintiff is entitled to plead alternative causes of action and, therefore, defendants' motion will be denied. Rule 8(a), Federal Rules of Civil Procedure.

[5] Defendant Kalmanovitz next moves for summary judgment on Count IX of plaintiff's complaint. In this count, plaintiff seeks to hold Kalmanovitz liable due to his alleged tortious interference with the contracts between plaintiff and Falstaff. Kalmanovitz moves for summary judgment, claiming that a corporate agent may not be held liable for tortious interference of the corporation's contract.

In *Nola* v. *Merollis Chevrolet Kansas City, Inc,* 537 S.W.2d 627, 634 (Mo.App. 1976), the court stated:

> . . . one interested as a stockholder or officer in a corporation is privileged to so induce the coporation [to breach a contract], provided that no improper means are used, the defendant acts in good faith to protect the corporation and does not act for his own personal benefit.

Plaintiff, in Count IX, alleges that, in interfering with the contractual relationship of plaintiff and Falstaff, Kalmanovitz was acting in bad faith and for his own personal benefit. Plaintiff further alleges that Kalmanovitz was acting without justifiable cause and in furtherance of no corporate purpose. Plaintiff's allegations clearly state a cause of action under the theory espoused in *Nola.* Kalmanovitz's motion for summary judgment, which is actually a motion to dismiss, will therefore be denied.

[6] Defendants next move for summary judgment on Counts III and IV of plaintiff's complaint, which seeks declaratory, in-

junctive, and monetary relief with respect to the Severance Plan. Defendants contend that, as the Severance Plan was not an employee pension plan subject to the vesting provisions of ERISA, they were free to terminate the plan at any time and for any reason they wished. Defendants are undoubtedly correct that the Severance Plan is not an employee pension plan within the meaning of 29 U.S.C. § 1002(2), *see* 29 C.F.R. 2510.3-2(b), and that the vesting provisions of ERISA do not apply. 29 U.S.C. § 1051(1). This Court can not conclude, though, that defendants' conclusion concerning their right to terminate the plan necessarily follows.

Plaintiff alleges that the revision of the plan wasmade by defendants expressly to deny plaintiff his anticipated severance benefit. Plaintiff claims that defendants violated their fiduciary responsibilities under 29 U.S.C. § 1104(a)(1) by amending the plan so as to make employees otherwise eligible now ineligible, at a time when they **[361]** were contemplating a large layoff of otherwise eligible employees.

The fiduciary duties applicable to the Severance Plan are set out in 29 U.S.C. § 1104(a)(1). This section provides that:

> . . . a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;

An amendment of the plan as alleged by plaintiff clearly violates this fiduciary duty. The fiduciaries are to guard the interests of the participants and beneficiaries, not those of the employer.

Defendants' contention that they could terminate the plan at any time and take back the accumulated assets is also in direct conflict with 29 U.S.C. § 1103(c)(1). This section provides that:

> Except as provided in paragraph (2) or (3) or subsection (d) of this section, or under sections 1342 and 1344 of this title (relating to termination of insured plans), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

ERISA is a statute designed to protect employees' interests in benefit plans. To argue that employer may terminate such plans at any time without violating the statute is clearly not supportable in the statutory language nor in equity. Defendants' motion for summary judgment as to Counts III and IV of plaintiff's complaint will, therefore, be denied.

[7] Defendants' last two motions for summary judgment are directed to Counts I and II of plaintiff's complaint. These counts seek declaratory and injunctive relief with respect to the Employee's Death Benefit Plan, which plaintiff alleges that defendants do not intend to honor. Defendants move for summary judgment on the grounds that plaintiff's allegations show, as a matter of law, that plaintiff did not qualify for benefits under the plan. Defendants rely on a summary and description of the plan included as an exhibit to plaintiff's complaint. In this exhibit, it is stated that an employee does not qualify until he has worked five years from the date of adoption of the agreement. It is undisputed that plaintiff did not work such a period for Falstaff.

The actual agreement is also an exhibit to plaintiff's complaint, though. In this agreement it is stated that an employee qualifies after five years of employment, disregarding the date of adoption of the agreement. Plaintiff worked more than five years for Falstaff. The actual agreement obviously prevails over conflicting language contained in a summary and description. Defendants' motions as to these counts will therefore be denied.

APPENDIX D

29 U.S.C. § 1140. Interference with protected rights

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this Act or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

* * * * * * * *

29 U.S.C. § 1132. Civil enforcement

Persons empowered to bring civil action

(a) A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

29 U.S.C. § 1144. Other laws

Supersedure; effective date

(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

Construction and application

(b)(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 1136 of this title.

(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

Definitions

(c) For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of United States prohibited

(d) Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

Pub.L. 93—406, Title I, § 514, Sept. 2, 1974, 88 Stat. 897.

Opposition

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SUPREME COURT OF THE UNITED STATES

CHARLES DEPENDAHL, JR., WILLIAM J. HEALY and JOHN C. CALHOUN,

Petitioners,

vs

PAUL KALMANOVITZ,

Respondent.

No. 81-641

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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CITATIONS

Alessi v. Raybestos-Manhattan, Inc., ___ U.S. ___ 68 L. Ed 2d 482 (1981). 5,6

American Telephone & Telegraph Co. v. Merry, 592 F. 2d 1118 (2d. Cir. 1979). 2

Azzaro v. Harnett, 414 F. Supp. 473 (S.D.N.Y. 1976) aff'd. 553 F. 2d 93 (2nd. Cir. 1977) cert. den. 434 U.S. 824 (1978). 4

Farmers v. Carpenters, 430 U.S. 290, 295 (1977). 8

Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146-147 (1963). 6

Landro v. Glendenning Motorways, Inc., 625 F. 2d 1344 (8th. Cir. 1980). 4

Operating Engineers Local No. 628 Pension Trust Fund v. Zamborsky, 650 F. 2d 196 (9th. Cir. 1981). 2

Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978). 3

Wadsworth v. Whaland, 562 F. 2d 70 (1st. Cir. 1977) cert. den. 445 U.S. 980 (1978). 4

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BRIEF IN OPPOSITION TO
PETITION FOR CERTIORARI

STATEMENT OF THE CASE

The actual facts of this case pertinent to petitioners' argument are contained in the Opinion of the United States Court of Appeals, Eighth Circuit and they appear on pages 2-5 of the Appendix.

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioners have attempted to construct an issue for review in this Court by ignoring the relevant case law in the particular area involved in this case. Petitioners have instead attempted to argue that case law in other areas should control the issues decided below. For the reasons set forth below it will clearly be established that the petition for certiorari filed is without merit and should be denied.

I.

THERE IS NO CONFLICT BETWEEN THE CIRCUITS AS TO THE PROPER INTERPRETATION OF 29 U.S.C. §1144.

Contrary to petitioners' allegation, there is harmony between the courts of appeal in their interpretation of 29 U.S.C. §1144. Petitioners cite American Telephone & Telegraph Co. v. Merry, 592 F. 2d 1118 (2d Cir. 1979) and Operating Engineers Local No. 628 Pension Trust Fund v. Zamborsky, 650 F. 2d 196 (9th. Cir. 1981) as support for their position that Congress did not intend to completely preempt the field when enacting ERISA. These cases contain facts that are inapposite to the facts found in the instant case. The cases cited by petitioners concern the broader area of "domestic relations".

The power of the states to regulate and control the area of "domestic relations" has traditionally not been in the domain of the federal courts. The traditional interplay between the state's domestic relations laws and federal preemption policies is well settled. It is presumed that the power of the states in this area is not superseded by federal legislation unless that was the clear and manifest purpose of Congress. Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978). For these reasons, the cases cited by petitioners which refer to the application of facts relating to the area of domestic relations have no place in the interpretation of a decision regarding the facts found in this case.

Despite petitioners' assertion to the contrary, the decision emanating out of the Eighth Circuit Court of Appeals in the instant case does not conflict with

the decisions of other circuits regarding cases with a similar factual basis. The Eighth Circuit in fact did not rely solely on "a purely literal reading of §1144 to oust all state laws touching on pension plans". (Petitioners' petition, p. 5).

The Eighth Circuit's decision reflects the established law in this area relating to preemption. The Court had as support for its decision the early cases of Azzaro v. Harnett, 414 F. Supp. 473 (S.D.N.Y. 1976), aff'd. 553 F. 2d 93 (2nd. Cir. 1977), cert. den. 434 U.S. 824 (1978); Wadsworth v. Whaland, 562 F. 2d 70 (1st Cir. 1977) cert. den. 445 U.S. 980 (1978); Landro v. Glendenning Motorways, Inc., 625 F. 2d 1344 (8th. Cir. 1980).

These cases revealed the Court's realization of the broad preemptive scheme provided by Congress when it was

enacting ERISA. In fact, this Court most recently in Alessi v. Raybestos-Manhattan, Inc., __ U.S. ___ 68 L. Ed. 2d 482 (1981), finally put to rest any doubt as to the broad preemptive scheme established by Congress in enacting ERISA. The Court of Appeals had the benefit of this Court's decision in Alessi and in fact quoted extensively from the case in their Opinion. (Appendix, pp. 11,12).

The petitioners' present claim relating to any conflicts that they allege are present throughout the circuits is untenable. There is no confusion regarding the degree of preemption to be accorded ERISA provided for in the statute by Congress and affirmed by this Court in Alessi.

II.

TO PREVENT THE POSSIBLE EROSION OF THE PROTECTION PROVIDED BY ERISA, CONGRESS MANDATED THAT STATE LAW BE PREEMPTED.

As this Court stated in Alessi, "we are assisted by an explicit Congressional statement about the preemptive effect of its action". Id. at 416. The explicit Congressional statement clearly established that Congress intended when enacting ERISA to occupy the field and preempt application of state law, the power granted and exercised under the Supremecy Clause. Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146-147 (1963). Congress's intent to totally preempt the field is apparent from the Statute which states, inter alia, "(a) Except as provided in

subsection(b) of this Statute, the provisions of the subchapter and subchapter III of this Chapter shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan . . .

(c) For purposes of this Section (1) the term "state law" includes all laws, decisions, rules, regulations or other state action having the effect of law of any state. The law of the United States applicable only to the District of Columbia shall be treated as a state law rather than as a law of the United States". 29 U.S.C. §1144.

Despite petitioners' assertions, the intent of Congress was clear. In their argument, petitioners cited several cases which they claim are controlling on the issues herein. An examination of those cases indicate that they concern the application of the National Labor

Relations Act and the degree to which it preempts state law. See Farmers v. Carpenters, 430 U.S. 290, 295 (1977). Neither of the cases cited refer to ERISA in any manner and as such, they are of little use in the evaluation of this case. In fact, the National Labor Relations Act does not contain the same type of explicit preemption clause as is found in the ERISA Statute.

Petitioners' other argument concerning the degree of intrusion by the federal law into state sovereignty is nothing more than age old debate with no importance to the issues before the Court. There is no need to continue the debate in this Court.

CONCLUSION

For the reasons stated, this Court should deny the petition for Writ of

Certiorari.

Respectfully Submitted,

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